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20 **UNITED STATES DISTRICT COURT**
DISTRICT OF NEVADA

21 PROTON ASSOCIATES LLC, and
 22 SETH MILLER,

23 v.

24 AVELO, INC.,

25 Defendant.

26 Case No. 2:25-cv-00856-JCM-BNW

27 **DEFENDANT AVELO, INC.'S MOTION**
FOR TEMPORARY RESTRAINING
ORDER AND PRELIMINARY
INJUNCTION

28 (Oral Argument Requested)

19 Defendant Avelo, Inc. (“Defendant” or “Avelo”) hereby moves the Court for entry of a
 20 temporary restraining order and/or preliminary injunction:

21 1. Enjoining and restraining Plaintiffs Proton Associates, LLC (“Proton”) and Seth
 22 Miller (“Mr. Miller”) (together, “Plaintiffs) and all other persons acting in concert or participation
 23 with them from: (a) using the Avelo Marks (as defined below) or any confusingly similar
 24 variations thereof, alone or in combination with any other letters, words, letter string, phrases or
 25 designs in commerce, including, without limitation, on any website, in any domain name
 26 confusingly similar to the Avelo Marks (including, without limitation, in the <avelno.com>
 27 domain name), in any social network user name confusingly similar to the Avelo Marks, in any
 28 hidden website text, or in any website metatag; (b) engaging in false or misleading advertising or

1 commercial activities likely to deceive consumers into believing that any Plaintiff is Avelo or that
 2 any of Plaintiffs' services are associated or affiliated with, connected to, approved by, or
 3 sponsored by Avelo; and (c) displaying or re-displaying the Infringing Billboards;

4 2. Requiring Dynadot Inc. ("Dynadot") (the domain name registrar of <avelno.com>) to place the <avenlo.com> domain name on hold and lock;¹ and

5 3. Setting a schedule for the completion of briefing and oral argument on Avelo's Motion for Preliminary Injunction.

6 This motion is supported by the papers and pleadings on file, by the accompanying declarations of Chase Player, Joanna M. Myers, and Jonathan W. Fountain, by the exhibits attached thereto, by the points and authorities set forth below, and by any oral argument the Court may require or allow.

PRELIMINARY STATEMENT

7 This is a trademark infringement dispute in which the accused trademark infringers—
 8 Plaintiffs in this case—have rushed to court seeking a declaratory judgment of non-infringement—a judgment Plaintiffs are not entitled to.

9 Avelo is a budget-friendly airline that provides service to travelers located throughout the United States. Recently, after Avelo announced its entry into a contract to provide airline services in support of the United States government's ongoing immigration enforcement efforts, Plaintiffs embarked upon an admittedly intentional campaign to damage Avelo's business, reputation, and goodwill using Avelo's own trademarks and trade dress to do so. Plaintiffs began by registering the <avelno.com> domain name to raise money for billboards, then contracted with Lamar Advertising ("Lamar") to erect two billboards in the New Haven, Connecticut area that appeared, as follows:



10 The website and billboards feature AVELNO!, a confusingly similar version of Avelo's

11 ¹ This is necessary to prevent the domain name from being transferred to a foreign domain name registrar, person, or entity, located outside of the Court's jurisdiction. (Player Decl. ¶ 16.)

1 federally registered AVELO® trademark, along with Avelo's signature yellow and violet trade
2 dress and distinctive logo. The billboards direct confused consumers to the <avelno.com> website
3 where they are asked to give money to "the AvelNO! Campaign" (which is NOT a registered non-
4 profit enterprise).

5 While Avelo does not object to Plaintiffs' voicing their opinion, Avelo objected to
6 Plaintiffs' unauthorized use of its intellectual property and sent cease-and-desist letters to Plaintiffs
7 and Lamar demanding that they cease and desist from infringing its intellectual property and that
8 they provide a written response by May 16, 2025. But instead of responding, Plaintiffs
9 preemptively filed the instant lawsuit seeking declarations of non-infringement and money
10 damages for Avelo's alleged interference with Plaintiffs' business relationship with Lamar.²

11 Plaintiffs' actions have crossed the line from any fair exercise of First Amendment rights
12 into an unfair and commercial misappropriation of Avelo's trademarks and brand identity, causing
13 actual consumer confusion and irreparable harm to the goodwill embodied in Avelo's trademarks.
14 Unless Plaintiffs are enjoined, Avelo will continue to suffer irreparable harm.

15 **STATEMENT OF MATERIAL FACTS**

16 **I. Avelo, its Business, and its Intellectual Property**

17 Avelo is a budget-friendly airline company incorporated in Nevada and headquartered in
18 Houston, Texas. (Player Decl. ¶ 2.) The company was acquired by its current CEO, Andrew
19 Levy, in 2018. (*Id.*) Avelo adopted and began using its AVELO® mark in commerce in April
20 2021, to provide its airline transportation and other services to travelers located throughout the
21 United States. Since April 2021, Avelo has continuously used its AVELO® and other marks.
22 Avelo's federal service mark registrations include,³ but are not limited to: (1) its AVELO word
23 mark, U.S. Trademark Reg. No. 6,910,702, for use in connection with, among others, "airline
24 transportation services" and "providing a website featuring information in the field of airline
25 passenger transportation;" (2) its "wishbone" design mark, U.S. Trademark Reg. No. U.S.
26 6,657,107, for use in connection with, among others, "airline transportation services" and

27 ² Avelo moved to dismiss that claim pursuant to Nevada's Anti-SLAPP statute, NRS § 40.660, filed an answer, and
28 filed Counterclaims for cybersquatting (15 U.S.C. § 1125(d)) and trademark infringement (15 U.S.C. § 1114). (See ECF Nos. 12, 13.)

³ Only Avelo's most relevant registered goods and services are listed here.

1 “providing information in the field of airline transportation by means of a global computer
2 network;” and (3) its “airliner” trade dress, U.S. Trademark Reg. No. 7,072,450, for use in
3 connection with “transportation services, namely transportation of persons by air; airline
4 transportation services” (all together, the “Avelo Marks”). (*See* Declaration of Chase Player (the
5 “Player Decl.”) ¶ 2 & Ex. A.)

6 The AVELO® word mark is a fanciful, coined, term that was created by Avelo for the sole
7 purpose of functioning as a trademark, namely as a designation of source for its goods and
8 services. (*Id.* ¶ 3.) Since April 2021, Avelo has displayed its Avelo Marks featuring the colors
9 violet, teal, white, and yellow color scheme, a combination that is unique to the airline industry.
10 (*Id.* ¶ 4.) By way of example, the AVELO house mark is consistently displayed on the exterior of
11 its airliners, at its ticket counters, throughout airports, on social media platforms, and in
12 advertisements in the color purple and in the distinct stylization shown below:



13
14
15 (*Id.*)

16 Since April 2021, Avelo has used its Avelo Marks and trade dress extensively to advertise,
17 market, and promote its airline transportation and other goods and services on the exterior of its
18 airliners, at its ticket counters, throughout airports, on social media platforms, and in
19 advertisements featured on billboards, in print and online advertising, including, magazines, e-
20 mails, press releases, and in other promotional materials, as well as on its <avelo.com> website,⁴
21 where it receives an average of over 4 million visitors per month. (*Id.* ¶ 5.) In addition, Avelo and
22 the Avelo Marks have gained significant unsolicited press having been the subject of numerous
23 print and online newspaper articles, videos, and television shows. (*Id.*)

24 Avelo has spent millions of dollars advertising, marketing, and promoting its goods and
25 services under the Avelo Marks. (*Id.* ¶ 6.) More specifically, from 2022 through 2024, its average
26 annual marketing expenditure was more than \$2.6 million. (*Id.*) As a result, consumers uniquely
27 associate the Avelo Marks with Avelo as a provider of high-quality, low-cost, airline services.

28 ⁴ The domain name <avelo.com> redirects to the <aveloair.com> website.

1 (Id.) Through these efforts, Avelo has achieved commercial success. (Id.) It presently services
2 approximately two (2) million passengers per year traveling to fifty-three (53) destinations. (Id.)
3 Its investments in advertising, marketing, and promoting its goods and services under the Avelo
4 Marks have resulted in average annual gross revenues between 2022 and 2024 of approximately
5 \$242 million. (Id.)

6 In April 2025, Avelo was presented with the opportunity to enter into a contract to provide
7 air transportation services in support of the U.S. government's immigration enforcement efforts.
8 (Id. ¶ 7.) Under the contract, Avelo makes three Boeing 737 aircraft available to facilitate the
9 movement by air of non-citizens. (Id.) To date, this has primarily consisted of domestic flights
10 between U.S. cities. (Id.) Avelo entered into the contract solely because it made business sense
11 and not for any political purpose. (Id.) Avelo previously provided similar transportation services
12 to the prior administration. (Id.) The contract will provide Avelo with a reliable source of revenue
13 that will help stabilize and subsidize its core passenger service, keep its more than 1,100
14 employees employed, and reduce its exposure to both economic volatility and seasonal downturns
15 in demand for its passenger service. (Id.)

16 II. The AVELNO! Campaign

17 Plaintiffs disagree with Avelo's decision to provide airline transportation services in
18 connection with the U.S. government's ongoing immigration enforcement efforts. (Compl. ¶ 19.)
19 Mr. Miller says he wants to make sure passengers know that Avelo is using its planes to deport
20 people and that he wants to pressure Avelo to reconsider its decision. (Id. ¶ 20.) He has taken
21 several steps to do this. On April 16, 2025, Mr. Miller registered the <avelno.com> domain name
22 through domain name registrar Dynadot. (See Myers Decl. ¶ 7 & Ex. B.) On April 17, 2025, Mr.
23 Miller registered "AvGeek Action Alliance" as a trade name. (Id. ¶ 6 & Ex. E.) Mr. Miller says
24 he did so to raise money to purchase billboards criticizing Avelo. (Compl. ¶ 21.) That same day
25 Mr. Miller registered the <avgeekaction.com> domain name also through domain name registrar
26 Dynadot. (See Myers Decl. ¶ 8 & Ex. C.) Next, on April 25, 2025, Mr. Miller contracted with
27 Lamar Advertising (defined above as "Lamar") to lease three billboards to be displayed between
28 May 5 and June 15. (Compl. ¶ 25.) The first two billboards went up on May 5, 2025. (Id. ¶ 26.)

1 They appeared as follows:



7 (Player Decl. ¶ 8.)

8 The billboards featured: “AVELNO!”, a confusingly similar version of Avelo’s registered
 9 AVELO® trademark, its trademarked “wishbone” design mark, the “avelo” house mark, and
 10 Avelo’s signature violet, teal, white, and yellow color scheme that Avelo uses on its website, in its
 11 Avelo Marks, in its advertising and promotional materials, and on signage located throughout
 12 airports (the “Infringing Billboards”). Importantly, the green text on the bottom directs viewers to
 13 <avelno.com>. The website closely resembles the Infringing Billboards. (See ECF No. 14-2, Ex.
 14 A to Smith Decl.)

15 Plaintiffs are using the <avelno.com> website to identify their AVELNO! campaign and to
 16 solicit funds from visitors to the page through links that allow visitors to donate money to the
 17 AVELNO! campaign using credit cards Amazon Pay, Klarna, or ACH bank transfer, with online
 18 payments processed by Stripe. (See ECF No. 14-1, Smith Decl. ¶¶ 2, 4; ECF No. 14-4, Ex. C to
 19 Smith Decl.) One link is found after the text: “Your support will enable us to extend and expand
 20 that messaging.” (*Id.*) It is contained in the following underlined text: “The most important thing
 21 you can do is not fly Avelo. And if you’re able, we’d appreciate your support for the avelNO!
 22 campaign.” (*Id.*) The other link is found at the bottom of the page. It is contained in the
 23 following underlined and italicized text: “If you’d like to donate more than \$999 this link can help
 24 with that.” (*Id.*) The source code for the webpage also uses “avelno.com” as an embedded
 25 metatag to ensure that the website appears in Internet search engine results. (*Id.* ¶ 2.)

26 Also, at the bottom of the page, the website contains a link to Plaintiffs’ other website
 27 <avgeekaction.com>. (*Id.* ¶ 2.) The link is embedded in the following underlined text: “avelNO!
 28 is a project of the AvGeekAction Alliance.” (*Id.*) The <avgeekaction.com> webpage also

1 contains a large image of the Infringing Billboards featuring the Avelo Marks and Avelo's trade
2 dress. (*Id.* ¶ 3 & Ex. B.) Like <avelno.com> it also refers to "The avelNO! campaign" and
3 contains links that allow visitors to the page to donate money to the "avelNO! campaign" using
4 credit cards and other forms of online payment. (*Id.*) All of the donation links on the
5 <avelno.com> and <avgeekaction.com> webpages redirected to the same Stripe payment
6 processing page. (*Id.*, ¶ 4 & Ex. C.)

7 **III. Avelo Demands that Plaintiffs Stop Infringing**

8 On May 9, 2025, Avelo's counsel sent Mr. Miller and Proton a cease and desist letter
9 demanding, among other things, that Plaintiffs, "cease all use of the AVELO Marks, logos,
10 designs, and trade dress on (1) websites accessible at the domain names <avelno.com>,
11 <avgeekaction.com>, and <millerfornh.com>, (2) billboards (both electronically and in printed
12 form), (3) social media, and (4) . . . remove all copyrighted pictures of Avelo aircraft displaying
13 Avelo's trademarks and trade dress." (Compl. ¶¶ 29-32; *see also* ECF No. 1-3, Ex. C to Compl. at
14 p. 4 of 17.) The letter requested a written response by May 16, 2025. (*Id.*, ECF No. 1-3 at p. 5 of
15 17.) On May 9, 2025, Avelo's counsel also sent a cease-and-desist letter to Lamar demanding,
16 among other things, that Lamar, "cease its participation in the infringement of Avelo's trademarks
17 and trade dress" and it informed Lamar that it could be held secondarily liable for contributing to
18 the infringement of Avelo's trademarks. (Compl. ¶¶ 40-43; *see also* ECF No. 1-4, Ex. D to
19 Compl. at pp. 3-4 of 15.) The letter requested a written response by May 16, 2025. (*Id.*, ECF No.
20 1-4 at p. 4 of 15.)

21 **IV. Lamar Takes the Infringing Billboards Down**

22 On May 15, 2025, Lamar, through counsel, responded to Avelo's cease-and-desist letter
23 stating, among other things, that it respects the intellectual property rights of others, was "in the
24 process of taking down" the billboards. (*See* ECF No. 14-1, Smith Decl. ¶ 10; ECF No. 14-5, Ex.
25 D to Smith Decl.) Implicit in Lamar's correspondence was its recognition that the Infringing
26 Billboards were, in fact, infringing upon Avelo's rights. (*Id.*)

27 **V. Plaintiffs Alter The <avelno.com> Website**

28 After receiving Avelo's cease-and-desist letters, Plaintiffs altered the <avelno.com>

1 website by adding a disclaimer to the top and bottom of the webpage indicating at the top that
 2 “avelNO.com is not associated with Avelo the airline” and at the bottom that, “we are not at all
 3 associated with Avelo the airline.” (ECF No. 14-1, Smith Decl. ¶ 9.) Plaintiffs also added links to
 4 Avelo’s website, <avelo.com>. (*Id.*) Plaintiffs did not, however, alter the appearance of the
 5 <avelno.com> website.⁵ (*Id.*) The image of the Infringing Billboard, and the accompanying
 6 language, “[o]ur billboard will look something like this; final design is still TBD,” is still displayed
 7 on the <avelno.com> and <avgeekalliance.com> websites as of the date of this motion. (*Id.*)

8 VI. Plaintiffs File Suit

9 On May 16, 2025, Plaintiffs preemptively filed the instant lawsuit. (*Id.* ¶ 8.) Plaintiffs
 10 allege that, as of May 16, 2025, the billboards were not being displayed. (Compl. ¶ 46.)

11 VII. Plaintiffs’ New Billboards

12 On May 28, 2025, the New Hampshire Independent published an article entitled, “Anti-
 13 Avelo Billboards Are Coming Back.” (See ECF No. 14-1, Smith Decl. ¶ 12; ECF No. 14-6, Ex. E
 14 to Smith Decl.) The article quotes Mr. Miller as stating approved “new art,” and that Lamar is
 15 erecting new versions of Plaintiffs’ billboards. It contains pictures of the New Billboards:



22 (*Id.*; see also https://www.newhavenindependent.org/article/avelo_protest_lawsuit (last visited
 23 June 11, 2025).) However, notwithstanding Plaintiffs’ display of their New Billboards, Plaintiffs
 24 have not taken down or restyled the <avelno.com> and <avgeekaction.com> websites. (Smith
 25 Decl. ¶ 9.)

26 ///

28 ⁵ Neither the disclaimers nor the links to Avelo’s website were present on <avelno.com> when Avelo’s counsel first
 viewed the webpage on May 8, 2025. (See ECF No. 14-1, Smith Decl. ¶ 9.)

VIII. Avelo is Suffering Irreparable Harm

Plaintiffs' use of Avelo's trademarks has already resulted in significant and irreparable harm to Avelo's business, reputation, and goodwill. (Player Decl. ¶¶ 9-10, 14; *see also* Myers Decl. ¶¶ 2- & Ex. A.) Consumers have already noted their actual confusion between Plaintiffs' AVELNO! campaign and the services Avelo offers under its AVELO® mark on Reddit attributing Plaintiffs' statements to Avelo itself. (*See* Myers Decl. ¶¶ 2-6 & Ex. A.) Moreover, Plaintiffs have expressed their intent to put the Infringing Billboards back up. (Fountain Decl. ¶¶ 2-4.) Avelo has suffered and, absent a temporary restraining order and/or preliminary injunction, will continue to suffer irreparable harm to its business, reputation, and goodwill.

LEGAL STANDARD

A party seeking a temporary restraining order or preliminary injunction must demonstrate: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm if preliminary relief is not granted; (3) the balance of equities is in their favor; and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008); *Stuhlbarg Int'l Sales Co, Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001) (holding analysis for temporary restraining order “substantially identical” to that governing motion for preliminary injunction). The moving party must make a threshold showing of likelihood of success on the merits and irreparable harm, but a stronger showing on one element may offset a weaker showing on another. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–33 (9th Cir. 2011).

ARGUMENT

I. A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION ARE NECESSARY TO PREVENT AVELO FROM CONTINUING TO SUFFER IRREPARABLE HARM.

A. Avelo is Likely to Succeed on the Merits of its Trademark Infringement and Cybersquatting Claims.

a. **Avelo Is Likely to Succeed on its Trademark Infringement Claim.**

To prevail on a trademark infringement claim, plaintiff must show: (1) it has a valid, protectable mark; and (2) defendant's use of the mark is likely to cause consumer confusion. *See*

1 *Brookfield Commc'ns, Inc. v. W. Coast Entm't Corp.*, 174 F.3d 1036, 1047, 1053 (9th Cir. 1999).

2 ***i. Avelo Owns Valid and Protectable Marks***

3 The Avelo Marks are registered on the Principal Register of the United States Patent &
4 Trademark Office. (Player Decl. ¶ 2 & Ex. A.) The registration certificates are *prima facie*
5 evidence of the validity and ownership of the Avelo Marks. 15 U.S.C. § 1057(b) (“A certificate of
6 registration of a mark upon the principal register provided by this chapter shall be *prima facie*
7 evidence of the validity of the registered mark and of the registration of the mark, of the owner’s
8 ownership of the mark, and of the owner’s exclusive right to use the registered mark in commerce
9 on or in connection with the goods or services specified in the certificate, subject to any conditions
10 or limitations stated in the certificate.”). Thus, Avelo owns the *exclusive* right to use the Avelo
11 Marks in U.S. and foreign commerce in connection with its registered and related goods and
12 services. *Id.*; *see also* 15 U.S.C. § 1115(a).

13 ***ii. Plaintiffs’ Use Has Caused and Will Continue to Cause Confusion***

14 The likelihood of confusion is the central element in a trademark infringement claim. *See*
15 *Goto.com v. The Walt Disney Co.*, 202 F.3d 1199 (9th Cir. 2000). “The test for likelihood of
16 confusion is whether a ‘reasonably prudent consumer’ in the marketplace is likely to be confused
17 as to the origin of the good or service bearing one of the marks.” *Dreamwerks Prod. Grp., Inc. v.*
18 *SKG Studio*, 142 F.3d 1127, 1129 (9th Cir. 1998). In determining whether a likelihood of
19 confusion exists, courts consider: (1) the strength of the allegedly infringed mark; (2) the similarity
20 of the marks; (3) the relatedness of the goods or services; (4) any evidence of actual confusion; (5)
21 marketing channel overlap; (6) the degree of consumer care; (7) the non-movant’s intent in
22 selecting the allegedly infringing mark; and (8) expansion of the parties’ product lines. *See AMF,*
23 *Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979). Courts need not analyze each factor
24 to reach a conclusion. *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137,
25 1145 (9th Cir. 2011) (“The *Sleekcraft* factors are intended as an adaptable proxy for consumer
26 confusion, not a rote checklist.”); *Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt.,*
27 *Inc.*, 618 F.3d 1025, 1030 (9th Cir. 2010) (“This eight-factor analysis is ‘pliant,’ illustrative rather
28 than exhaustive, and best understood as simply providing helpful guideposts.”). Some factors are

1 much more important than others, and . . . it is often possible to reach a conclusion after
2 considering only a subset of the factors.” *Brookfield Commc’ns, Inc.*, 174 F.3d at 1054 (citing
3 *Dreamwerks*, 142 F.3d at 1130–32)). Here, actual confusion has already occurred and the
4 *Sleekcraft* factors show there is a high likelihood of further confusion between Avelo’s federally
5 registered AVELO® Marks and Plaintiffs’ nearly identical AVELNO! mark.

6 **1. Strength of the Marks**

7 A strong mark is inherently distinctive and is afforded the widest scope of protection from
8 infringing uses. *Sleekcraft*, 599 F.2d at 349. This is because “[t]he stronger the mark, the more
9 likely it is that encroachment on it will produce confusion.” 1 J. Thomas McCarthy, *McCarthy on*
10 *Trademarks and Unfair Competition* § 11:73 (5th ed. 2024) (“McCarthy”) (quotations omitted).
11 The strength of a trademark is determined based on its conceptual and commercial strength.
12 *Goto.com v. The Walt Disney Co.*, 202 F.3d 1199, 1207 (9th Cir. 2000).

13 Conceptual strength is determined by the mark’s placement on a continuum from weak to
14 strong: generic (no protection), descriptive (no protection absent a showing of secondary
15 meaning), suggestive (moderate protection), and at the strongest end of the continuum, arbitrary
16 (entitled to more protection) and fanciful (entitled to the most protection). *See id.; see also Two*
17 *Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992). “After identifying whether a mark is
18 generic, descriptive, suggestive, arbitrary, or fanciful, the court determines the mark’s commercial
19 strength.” *Harman Int’l Indus., Inc. v. Jem Access., Inc.*, 668 F. Supp. 3d 1025, 1039 (C.D. Cal.
20 2023). Here, the AVELO mark is conceptually strong because it is a coined, term created solely to
21 function as a mark. (Player Decl. ¶ 3.) As a coined term, it is a “fanciful” mark afforded the
22 broadest degree of protection against infringement. *See Dreamwerks*, 142 F.3d at 1130 n.7
23 (“Arbitrary or fanciful marks deserve wide protection because the trademark holder can properly
24 expect to run into very little confusion from honest competitors. A fanciful mark is a coined word
25 or phrase, such as Kodak, invented solely to function as a trademark.”).

26 Commercial strength “may be demonstrated by commercial success, extensive advertising,
27 length of exclusive use, and public recognition.” *Harman Int’l Indus., Inc. v. Jem Access., Inc.*,
28 668 F. Supp. 3d 1025, 1039 (C.D. Cal. 2023). Avelo has spent millions of dollars advertising,

1 marketing, and promoting its goods and services under the Avelo Marks, including AVELO. (*Id.* ¶
 2 6.) More specifically, from 2022 through 2024, its average annual marketing expenditure was
 3 more than \$2.6 million. (*Id.*) As a result of its extensive advertising and marketing utilizing the
 4 Avelo Marks, consumers uniquely associate the Avelo Marks with Avelo as a provider of high-
 5 quality, low-cost, airline services. (*Id.*) Through these efforts, Avelo has achieved commercial
 6 success. (*Id.*) It presently services approximately two (2) million passengers per year generating
 7 approximately \$242 million in annual revenue. (*Id.*) Because AVELO is conceptually and
 8 commercially strong mark this factor favors Avelo.

9 2. *Similarity of the Marks*

10 “[T]he greater the similarity between the two marks at issue, the greater the likelihood of
 11 confusion.” *Goto.com*, 202 F.3d at 1206. Similarity is determined based on sight, sound,
 12 meaning, and the overall commercial impression of the marks as they appear in the marketplace.
 13 *Id.* “One thing is very clear: ‘exact similitude is not required’ between the allegedly confusing
 14 marks.” 4 McCarthy § 23:20. What “is critical is the *overall* appearance of the mark as used in
 15 the marketplace, not a deconstructionist view of the different components of the marks.” *adidas-*
 16 *Am., Inc. v. Payless Shoesource, Inc.*, 546 F. Supp. 2d 1029, 1053 (D. Or. 2008) (quoting
 17 *Playmakers, LLC v. ESPN, Inc.*, 297 F. Supp. 2d 1277, 1283 (W.D. Wash. 2003), *aff’d*, 376 F.3d
 18 894 (9th Cir. 2004) (emphasis in original)).

19 Here, Plaintiffs’ AVELNO! mark differs from Avelo’s AVELO® mark by a single letter
 20 and an exclamation point, which does not count in the analysis.⁶ *See, e.g., Cuisinarts, Inc. v. John*
 21 *Boos & Co.*, 622 F. Supp. 1168, 1171 (S.D.N.Y. 1985) (finding CUISINART and CUISI CART
 22 confusingly similar). Plaintiffs’ insertion of the single letter “n” is a minimal change, insufficient
 23 to render AVELO® and AVELNO! dissimilar enough to avoid confusion—as evidenced by the
 24 instances of actual confusion.. Accordingly, this factor favors Avelo.

25 3. *Plaintiffs’ Intent in Selecting a Similar Mark*

26 The intentional adoption of a similar mark supports a finding that confusion is likely
 27 because reviewing courts will presume that the alleged infringer will accomplish his or her purpose

28 ⁶ Punctuation, such as exclamation marks, generally does not significantly alter the commercial impression of a mark.
See e.g., In re Litehouse, Inc., 82 U.S.P.Q.2D 1471, 1474 (T.T.A.B.2007).

(*i.e.*, that the public will be deceived). *See Sleekcraft*, 599 F.2d at 354 (comparing SLICKCRAFT and SLEEKCRAFT marks and stating, “[w]hen the alleged infringer knowingly adopts a mark similar to another’s, reviewing courts presume that the defendant can accomplish his purpose: that is, that the public will be deceived”). Thus, as Professor McCarthy has observed, “[a] wrongful intent appears easy to infer where defendant knew of plaintiff’s mark, had freedom to choose any mark and ‘just happened’ to choose a mark confusingly similar to plaintiff’s mark.” 3 McCarthy § 23:115. Plaintiffs’ intent in adopting AVELNO! is indisputable. (*See* Compl. ¶ 3 (“The word ‘AvelNO’ . . . is . . . *Avelo*’s blue-text trademark[] with the ‘N’ inserted between the ‘L’ and the ‘O’”) (emphasis added).) Plaintiffs also admit that they “specifically wanted to make sure passengers ” heard their message and to that end, intentionally registered the domain name <avelno.com> and adopted the corresponding mark AVELNO!, which differs from the Avelo Marks by just one letter.” (Compl. ¶¶ 20, 22.) Further evidence of Plaintiffs’ intent to divert consumers is found in the HTML code underlying <avelno.com>. The image file containing the large image of “avelNo!” displayed on the page is named “avelNO.png.” (Myers Decl. ¶ 11 & Ex. F.) A comment in the code next to the file name describes the file as: “Logo altering the Avelo brand name to read avelNO!” (*Id.*) Plaintiffs’ intentional selection of a confusingly similar mark strongly favors Avelo.

18 *4. Actual Confusion*

19 “Evidence that use of two marks has already led to confusion is persuasive proof that future
 20 confusion is likely.” *Sleekcraft*, 599 F.2d at 352. When “evidence of actual confusion is available,
 21 the evidence is so highly probative of the likelihood of confusion that it is rarely ignored.” 5 Louis
 22 Altman and Malla Pollack, *Callmann on Unfair Competition, Trademarks & Monopolies* § 21:82
 23 (4th ed.) (hereinafter, “Callmann”). “There can be no more positive or substantial proof of the
 24 likelihood of confusion than proof of actual confusion.” 3 McCarthy § 23:13 (quoting *World
 25 Carpets, Inc. v. Dick Littrell’s New World Carpets*, 438 F.2d 482, (5th Cir. 1971)). In this case,
 26 there is already evidence of actual confusion. Users on Reddit⁷ have discussed the Infringing

27 ⁷ Reddit is a social media platform and forum website where users share content like text posts, links, images, and
 28 videos, which are then voted up or down by other users. These submissions are organized into user-created
 communities called “subreddits,” each focusing on a specific topic or interest.

1 Billboards, noting their confusion. User **Barbiebrattt** commented that she saw the Infringing
 2 Billboard but was confused as to whether Avelo was its source, stating: “I was driving on I-95 in
 3 New Haven and I seen [sic] a billboard by Avelo saying ‘Does your vacation support their
 4 deportation? Fly Avelo’ wtf does that mean???” (Myers Decl. ¶¶ 2-3 & Ex. A.) Another user,
 5 **Cherry-Wine**, stated: “Wait, the billboard was by Avelo in support of them?? Are they doubling
 6 down? I could understand that if it said “Don’t Fly Avelo”. (*Id.* ¶ 4 & Ex. A.) **Barbiebrattt**
 7 responded, stating: “That’s what’s confusing me...” (*Id.*) Another user, **SageOfKonisberg**
 8 commented: “Is it by Avelo, someone far-right supporting Avelo, or someone critical of Avelo?
 9 I’d be surprised if they put that themselves.” (*Id.* ¶ 5 & Ex. A.) **Barbiebrattt** responded, stating:
 10 “Avelo themselves! Next time I will take a picture.” (*Id.*) User **Magehunter_Skassi** was also
 11 confused, stating: “Is that an advertisement or an attack ad.” (*Id.* ¶ 6 & Ex. A.) **Barbiebrattt**
 12 apparently encountered the Infringing Billboard at night while driving and stated, “I’m an idiot I
 13 didn’t see the red [N] during the day time . . . I knew something was off. Definitely a protest.”
 14 (*See* Myers Decl. ¶ 12 & Ex. A.) In light of this evidence of actual confusion, this factor also
 15 favors Avelo.

16 5. *Similarity of the Parties’ Goods/Services*

17 Confusion is more likely when the parties’ goods and services are similar. *Lindy Pen Co.*
 18 *v. Bic Pen Corp.*, 796 F.2d 254, 255 (9th Cir. 1986) (noting the “obvious conclusion that a
 19 likelihood of confusion is more readily found when the goods compete”); McCarthy § 24:22
 20 (“Where the goods or services are directly competitive, the degree of similarity of marks needed to
 21 cause likely confusion is less than in the case of dissimilar goods or services. The rule is that the
 22 more similar the goods and services of the parties, the more likely is confusion caused by the
 23 similar marks.”). Here, Avelo owns exclusive nationwide rights in its AVELO® mark for use in
 24 connection with, “providing a website featuring information in the field of airline passenger
 25 transportation.” (Player Decl. ¶ 2 & Ex. A.) Similarly, Plaintiffs’ Infringing Billboards and
 26 <avelno.com> provide information “in the field of airline passenger transportation.” The
 27 Infringing Billboards and the <avelno.com> website each refer to Avelo’s role in the government’s
 28 immigration enforcement efforts including by commenting on whether consumers should fly

1 Avelo Airlines. (See ECF Nos. 1-1, 1-2 (pictures of the Infringing Billboards; ECF No. 14-2
2 (image of <avelno.com> website); ECF No. 14-3 (image of <avgeeaction.com> website).) The
3 fact that both Avelo and Plaintiffs provide information related to airline transportation makes
4 confusion more likely than not and weighs heavily in Avelo's favor.

5 ***6. Similarity of Marketing Channels***

6 When marketing channels are similar, consumers are more likely to be confused by a
7 defendant's use of identical or similar marks. See *Sleekcraft*, 599 F.2d 353 ("convergent
8 marketing channels increase the likelihood of confusion"); *Interstellar Starship Services v. Epix,*
9 *Inc.*, 125 F. Supp. 2d 1269, 1277 (D. Or. 2001) ("The likelihood of confusion increases with the
10 overlap in marketing channels utilized by plaintiff and defendant"). Here, Avelo uses its Avelo
11 Marks on billboards and websites. (Player Decl. ¶ 5.) So do Plaintiffs. (See generally,
12 Complaint.) Because the parties' marketing channels are identical, there is an increased likelihood
13 of confusion and this factor favors Avelo.

14 ***7. The Degree of Consumer Care***

15 The lower the degree of consumer care, the greater the likelihood of confusion. *Network*
16 *Automation, Inc.*, 638 F.3d at 1152 (citing *Playboy Enterprises, Inc. v. Netscape Commc'n Corp.*,
17 354 F.3d 1020, 1028 (9th Cir. 2004)). On the one hand, purchasers of airline tickets likely
18 exercise some degree of care. On the other hand, however, consumers encountering Plaintiffs'
19 infringing use of the AVELNO! mark exercise an exceedingly low degree of care driving past
20 billboards unable to read the content in great detail given the speed of traffic, resulting in
21 consumers mistakenly believing the billboards originate from Avelo, which they do not. (Myers
22 Decl. ¶¶ 2-6, Exhibit A.) Accordingly, this factor favors Avelo.

23 ***8. Expansion Into New Markets***

24 Because Avelo and Plaintiffs both provide information concerning airline transportation on
25 the Internet, this factor is "relatively unimportant" and neutral in the analysis. *Brookfield*, 174
26 F.3d at 1060 ("The likelihood of expansion in product lines factor is relatively unimportant where
27 two companies already compete to a significant extent"); *GOTO.com, Inc.*, 202 F.3d at 1205
28 ("Because Disney and GoTo compete with one another by providing similar Internet search

engines, we decline to evaluate the issue of whether there is a likelihood of expansion of their product lines”).

9. Summary of the Sleekcraft Analysis

In sum, of the eight (8) *Sleekcraft* factors, seven (7) of them tend to show that confusion is likely and one (1) is neutral.

b. Avelo is Likely to Succeed on its Cybersquatting Claim.

Plaintiffs have committed cybersquatting in violation of the Anti-Cybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d) (the “ACPA”), by registering <avelno.com> with a bad faith intent to profit. To prevail on a cybersquatting claim, a plaintiff must prove: “(1) registration of a domain name, (2) that was ‘identical or confusingly similar to’ a mark that was distinctive at the time of registration,” and (3) “a bad faith intent to profit from that mark.” *GoPets Ltd. v. Hise*, 657 F.3d 1024, 1030 (9th Cir. 2011) (quoting 15 U.S.C. § 1125(d)(1)). Each element is satisfied.

i. Plaintiffs Registered <avelno.com> on April 16, 2025

Plaintiffs admit to “creating avelNO.com.” (Compl. ¶ 22.) Plaintiffs registered the domain name on April 16, 2025. (See Myers Decl. ¶ 7 & Ex. B.) Accordingly, the first element is satisfied.

ii. It is Confusingly Similar to the Distinctive AVELO Mark

“In determining whether there is confusing similarity under the ACPA, courts compare the plaintiff’s mark with the name of the website.” *Super-Krete Int’l v. Sadleir*, 712 F. Supp. 2d 1023, 1031 (C.D. Cal. 2010). “The ACPA has been interpreted to prohibit ‘typosquatting’ — that is, registering intentional misspellings of famous trademarks or names.” *Verizon California Inc. v. Navigation Catalyst Sys., Inc.*, 568 F. Supp. 2d 1088, 1094 (C.D. Cal. 2008) (“A reasonable interpretation of conduct covered by the phrase ‘confusingly similar’ is the intentional registration of domain names that are misspellings of distinctive or famous names, causing an Internet user who makes a slight spelling or typing error to reach an unintended site.”) (citing *Shields v. Zuccarini*, 254 F.3d 476, 484 (3d Cir. 2001)); *Shutterstock, Inc. v. Pikulski*, No. 14cv0869 WQH (NLS), 2014 U.S. Dist. LEXIS 162994, at *9 (S.D. Cal. Nov. 19, 2014) (holding shutterst0ck.com, shutterst9ck.com, shutterstpck.com, ehtutterstock.com, zhutterstock.com, whutterstock.com and,

1 sh7tterstock.com confusingly similar to plaintiff's SHUTTERSTOCK mark); *Lendingclub Bank v.*
2 *LeNddingclub.Com*, No. 1:22cv0484 (AJT/JFA), 2023 U.S. Dist. LEXIS 48514, at *21 (E.D. Va.
3 Feb. 27, 2023) ("A domain name is considered confusingly similar to a mark when the domain
4 name is a typographical variation of the mark or is a variation of the mark where the mark remains
5 the dominant portion of the domain name."); *Volvo Trademark Holding AB v. Volvospare.com*,
6 703 F. Supp. 2d 563, 568 (E.D. Va. 2010) ("In assessing whether a mark is confusingly similar, the
7 allegedly infringing domain name does not need to be identical to the registered mark. Rather, the
8 'dominant or salient portions' of the domain name must be sufficiently similar.").

9 Here, the <avelno.com> domain name incorporates the AVELO mark in its entirety,
10 retaining the dominant portion of the AVELO mark and inserting only the single letter "N"
11 between the letters "L" and "O." Because it is only one letter off, it is confusingly similar to the
12 AVELO mark. In addition, the AVELO mark is distinctive and was at the time when Plaintiffs
13 registered <avelno.com>. The mark is inherently distinctive because it is a fanciful, coined, term.
14 See Part I(A)(a)(ii)(1), *supra*. Moreover, as a federally registered trademark, its distinctiveness is
15 presumed. See 15 U.S.C. §§ 1115(a) and 1057(b); *Avery Dennison Corp. v. Sumpton*, 189 F.3d
16 868, 876 (9th Cir. 1999) ("Furthermore, registration on the principal register creates a presumption
17 of distinctiveness"). Accordingly, when Plaintiffs registered <avenlo.com> on April 16,
18 2025, the AVELO mark was distinctive.

19 ***iii. Plaintiffs' Bad Faith Intent to Profit is Manifest***

20 Courts consider nine nonexclusive factors when determining whether a bad faith intent to
21 profit exists: (1) the trademark or other intellectual property rights of the non-movant, if any, in the
22 domain name; (2) whether the domain name consists of the legal name of the non-movant; (3) the
23 non-movant's prior use, if any, of the domain name in connection with the bona fide offering of
24 any goods or services; (4) the non-movant's bona fide noncommercial or fair use of the mark in a
25 site accessible under the domain name; (5) the non-movant's intent to divert consumers from the
26 mark owner's online location to a site accessible under the domain name that could harm the
27 goodwill represented by the mark, either for commercial gain or with the intent to tarnish or
28 disparage the mark, by creating a likelihood of confusion as to the source, sponsorship, affiliation,

1 or endorsement of the site; (6) the non-movant's offer to transfer, sell, or otherwise assign the
 2 domain name to the mark owner or any third party for financial gain without having used the
 3 domain name in the bona fide offering of any goods or services; (7) the non-movant's provision of
 4 misleading false contact information when applying for the domain-name registration; (8) the non-
 5 movant's registration of multiple domain names that are identical or confusingly similar to the
 6 marks of others; and (9) the extent to which the mark incorporated in the non-movant's domain
 7 name registration is or is not distinctive and famous. 15 U.S.C. § 1125(d)(1)(B)(i).

8 However, “[t]he most important grounds for finding bad faith are the unique circumstances
 9 of the case, which do not fit neatly into the specific factors” enumerated by Congress. *Interstellar*
 10 *Starship Servs., Ltd. v. Epix, Inc.*, 304 F.3d 936, 946-47 (9th Cir. 2002). Moreover, evidence of
 11 bad faith may arise after the registration of the domain name. *DSPT Int'l, Inc. v. Nahum*, 624 F.3d
 12 1213, 1220 (9th Cir. 2010). “Determining bad faith intent to profit using the nine statutory factors
 13 and the ‘unique circumstances of the case’ is fact dependent.” *Anlin Indus., Inc. v. Burgess*, 301 F.
 14 App’x 745, 746 (9th Cir. 2008). Because “intent is rarely discernable directly, it must typically be
 15 inferred from pertinent facts and circumstances.” *Int'l Bancorp, L.L.C. v. Societe des Bains de Mer*
 16 *et du Cercle des Etrangers a Monaco*, 192 F. Supp. 2d 467, 486 (E.D. Va. 2002). Here, six of the
 17 nine bad faith factors (Nos. 1-5 and 9) evidence Plaintiffs’ bad faith intent to profit from their
 18 registration of <avelno.com>.⁸

19 **I. Plaintiffs Have No Trademark Rights in the AVELO Mark**

20 Trademark rights are acquired by the use of a trademark in commerce.
 21 *Sengoku Works Ltd. v. RMC Int'l, Ltd.*, 96 F.3d 1217, 1219 (9th Cir. 1996) (“To acquire ownership
 22 of a trademark it is not enough to have invented the mark first or even to have registered it first;
 23 the party claiming ownership must have been the first to actually use the mark in the sale of goods
 24 or services.”). Here, there is absolutely no evidence that Plaintiffs ever used the AVELO mark in
 25 commerce. Absent any rights in the AVELO mark, this factor weighs in Avelo’s favor.

26 ///

27 ⁸ Factors, 6, 7, and 8 are inapplicable or neutral because there is no evidence that Plaintiffs offered to sell the domain
 28 name after registering it, provided false contact information when registering it, or is engaged in a pattern of
 registering multiple domain names containing others’ trademarks.

2. *The Domain Name Contains the AVELO Mark*

The <avelno.com> domain name wholly incorporates the AVELO mark and differs only by the insertion of a single letter—“N” between the “L” and the “O” in AVELO. Because the domain name wholly incorporates the AVELO mark, this factor weighs in Avelo’s favor.

3. Plaintiffs' Had No Prior Use of The Domain Name

Plaintiffs began their “avelNO! campaign” by registering <avelno.com> on April 16, 2025. (See Compl. ¶ 22; Myers Decl. ¶ 7 & Ex. B.) There is no evidence that Plaintiffs ever engaged in any prior use of <avelno.com> in connection with the bona fide offering of any goods or services. Because Plaintiffs never engaged in any prior use of <avelno.com> in connection with the bona fide offering of any goods or services, this factor weighs in Avelo’s favor.

4. Plaintiffs Have No Bona Fide Noncommercial Use

Plaintiffs have not engaged in any *bona fide* noncommercial use on <avelno.com>. Plaintiffs are doing precisely what the law forbids. They are using the confusingly similar <avelno.com> domain name to trade off of the goodwill Avelo has developed in its Avelo mark in order to confuse Web users into thinking that they are entering a Web site of [Avelo's] in order to expose them to [Plaintiffs'] message of criticism of [Avelo]. To the extent Plaintiffs also criticize Avelo in connection with their attempts to raise money for their "avelNO! campaign" through the <avelno.com> website, their right to criticize Avelo does not trump the public's right not to be deceived by a confusingly similar domain name. See 4 McCarthy § 31:148 & n.2 ("[A] Web site containing criticism of a company or an organization cannot be identified by a domain name confusingly similar to the name or trademark of the target group. The right to disseminate criticism on the Internet cannot trump the public's right not to be deceived by a confusingly similar domain name. And the critic has no free speech 'right' to confuse Web users into thinking that they are entering a Web site of the target in order to expose them to the defendant's message of criticism of the target.") Accordingly, any noncommercial use Plaintiffs have engaged in on <avelno.com> has not been *bona fide*, and this factor favors Avelo.

5. Plaintiffs' Clear Intent to Divert Consumers

Plaintiffs clearly intend to divert consumers looking for Avelo to avelno.com website by

1 registering a domain name that they knew was confusingly similar to the AVELO mark. *See Part*
 2 I(A)(a)(ii)(3), *supra*. There is no doubt that Plaintiffs registered <avelno.com> to divert
 3 consumers seeking Avelo. *See, e.g., MGM Resorts Int'l v. Unknown Registrant of*
 4 *www.imgmcasino.com*, 2015 U.S. Dist. LEXIS 128397, at *27 (D. Nev. July 8, 2015), *report and*
 5 *recommendation adopted*, 2015 U.S. Dist. LEXIS 128394 (D. Nev. Sept. 23, 2015) (defendant's
 6 "intent to divert consumers [] apparent" where the domain name [imgmcasino.com] "strongly
 7 suggests the website is sponsored or endorsed by [the plaintiff] because it contains [the plaintiff's]
 8 mark and name"). Accordingly, this factor favors Avelo.

9 6. The Avelo Mark is Distinctive

10 The federally registered AVELO mark is inherently distinctive and presumed distinctive.
 11 *See* Parts I(A)(a)(1), I(A)(b)(ii), *supra*. Accordingly, this factor favors Avelo.

12 7. Summary of the Bad Faith Factors

13 Of the six (6) relevant bad faith factors (Nos. 1-5 and 9), every one of them favors Avelo
 14 and a finding that Plaintiffs possessed a bad faith intent to profit from their registration of
 15 <avelno.com>.

16 iv. Summary of the Cybersquatting Elements

17 Avelo has shown that Plaintiffs registered a domain name that is confusingly similar to
 18 Avelo's distinctive AVELO mark and that they did so with a bad faith intent to profit. Because
 19 each of the cybersquatting elements are satisfied, Avelo is likely to succeed on the merits of its
 20 cybersquatting claim.

21 B. Avelo is Suffering Irreparable Harm to its Reputation, Business, and Goodwill.

22 When an infringer uses a mark it doesn't own, it "borrows the owner's reputation, whose
 23 quality no longer lies within his own control." 4 McCarthy § 24:14 (citing *Yale Elec. Corp. v.*
 24 *Robertson*, 26 F.2d 972, 974 (2d Cir. 1928) (Hand, J.)). This loss of control is "an injury, even
 25 though the borrower does not tarnish it, or divert any sales by its use; for a reputation, like a face,
 26 is the symbol of its possessor and creator, and another can use it only as a mask." *Id.* Like many
 27 circuits, the Ninth Circuit previously held that intangible injuries such as loss of goodwill and
 28 reputation must be supported by evidence and more than mere speculation to support the entry of

1 injunctive relief. *Herb Reed Enters., LLC v. Fla. Ent. Mgmt., Inc.*, 736 F.3d 1239 (9th Cir. 2013)
 2 (reversing a preliminary injunction in the absence of evidence to support irreparable harm). **But**
 3 **Herb Reed is no longer good law.** In 2020, recognizing the unique nature of trademarks and the
 4 intangible nature of the harm trademark owners suffer from infringement, Congress amended the
 5 Lanham Act to revive⁹ the rebuttable presumption of irreparable harm once the movant seeking a
 6 TRO or preliminary injunction demonstrates a likelihood of success on the merits. *See* 15 U.S.C. §
 7 1116(a) (“A plaintiff seeking any such injunction ***shall be entitled to a rebuttable presumption of***
 8 ***irreparable harm . . . upon a finding of likelihood of success on the merits . . .*** in the case of a
 9 motion for a preliminary injunction or temporary restraining order.”) (emphasis added).

10 Therefore, if this Court finds that Avelo has shown a likelihood of success on the merits
 11 (and it should), Avelo is entitled to the statutory presumption of irreparable harm, and the burden
 12 shifts to Plaintiffs to rebut the presumption. *See Patagonia, Inc. v. Agnew*, No. 2:25-cv-03283-
 13 CV-SK, 2025 U.S. Dist. LEXIS 107374, at *19-21 (C.D. Cal. June 5, 2025) (“because [the
 14 movant] Patagonia has shown that it is likely to succeed on the merits of its trademark
 15 infringement and counterfeiting claims . . . it is [the non-movant] Defendants’ burden to provide
 16 evidence that rebuts the presumption of irreparable harm; ***it is not Patagonia’s burden to prove***
 17 ***that it has been irreparably harmed.***”) (emphasis added); *Vital Pharms. v. PhD Mktg., Inc.*, No.
 18 CV 20-6745- RSWL-JCX, 2021 WL 6881866, at *6 (C.D. Cal. Mar. 12, 2021) (“Congress has
 19 plainly altered the language of Section 1116 to create a presumption of irreparable harm ***and has***
 20 ***thereby overridden this circuit’s precedents mandating affirmative evidence of such harm.***”)
 21 (emphasis added); *see also Shakeys Pizza Asia Ventures, Inc.*, No. 24-7084, 2025 U.S. App. LEXIS
 22 12052, at *4 (9th Cir. May 15, 2025) (“Under the Lanham Act, a showing of a likelihood of
 23 success on the merits creates a rebuttable presumption of irreparable harm, 15 U.S.C. § 1116(a),
 24 which the district court reasonably found [defendant] failed to rebut.”); *accord, AK Futures LLC v.*
 25 *Boyd Street Distro, LLC*, 35 F.4th 682, 694 (9th Cir. 2022) (“By statute, AK Futures is entitled to a
 26 rebuttable presumption of irreparable harm on its trademark claim because the company has shown
 27 it will likely succeed on the merits”); *Vision Wheel, Inc v. Vision Forged*, 732 F. Supp. 3d 1161,

28 ⁹ The Ninth Circuit’s decision in *Herb Reed* eliminated the presumption of irreparable harm that previously existed.

1 1166 (C.D. Cal. 2024) ("Under the Lanham Act, as amended in 2020, a plaintiff seeking injunctive
 2 relief to stop infringement of its trademark 'shall be entitled to a rebuttable presumption of
 3 irreparable harm...') (citing 15 U.S.C. § 1116(a)).

4 In *Patagonia*, and cases since the 2020 amendment to the Lanham Act, the Ninth Circuit
 5 has repeatedly held that the statutory presumption of irreparable harm is the correct legal standard.
 6 *Id.*; see also *AK Futures LLC*, 35 F.4th at 694 (affirming district court's finding of irreparable harm
 7 because the defendant failed to rebut the statutory presumption of irreparable harm where plaintiff
 8 had shown it would likely succeed on the merits).

9 However, even absent the presumption there is ample evidence that Avelo has suffered and
 10 will continue to suffer irreparable harm. Plaintiffs have directed their AVELNO! campaign
 11 squarely at Avelo's customers and prospective customers. Plaintiffs' AVELNO! mark is
 12 confusingly similar to Avelo's AVELO mark, which Avelo has spent the last several years
 13 establishing as a source-identifier in the airline transportation market at great expense. Thus,
 14 Avelo is already suffering irreparable harm to its goodwill and reputation as a result, and it will
 15 continue to suffer such irreparable harm in the absence of a TRO/preliminary injunction. See *Well*
 16 *Care Pharm. II, LLC v. W' Care, LLC*, No. 2:13-cv-540-GMN-VCF, 2013 WL 3200111, at *8 (D.
 17 Nev. June 24, 2013) ("[T]he similarities between the marks and the identical market in which the
 18 parties operate will likely result in consumer confusion," which "poses an ongoing risk of
 19 irreparable injury to Plaintiff's goodwill and reputation."); *Boldface Licensing + Branding v. By*
 20 *Lee Tillett, Inc.*, No. 12-cv-10269-ABC-PJWX, 2013 WL 1685464, at *15 (C.D. Cal. May 11,
 21 2013) (defendant's use of confusingly similar mark would likely result in lost business
 22 opportunities, customers, and goodwill); *Century 21 Real Estate LLC v. All Prof'l Realty, Inc.*,
 23 2011 WL 221651, at *12 (E.D. Cal. 2011) ("Regardless of whether the presumption still applies, in
 24 this case it is clear that Century 21 will suffer irreparable harm if All Professional is not enjoined
 25 from using its trademarks . . . [T]he Ninth Circuit has recognized that damage to goodwill is an
 26 irreparable harm.").

27 **C. The Balance of Hardships Weighs in Avelo's Favor.**

28 The balance of hardships (*i.e.*, equities) weighs strongly in Avelo's favor because the

1 requested injunction will not harm Plaintiffs at all but, if it is denied, Avelo will continue to suffer
2 irreparable harm to the goodwill embodied in the Avelo Marks. If enjoined, Plaintiffs may suffer
3 some inconvenience, limited to setting up a new domain name and website, but they will not suffer
4 any irreparable harm because they remain free to promote their Anti-Avelo message. They would
5 only be limited from using Avelo's intellectual property to do so. For example, Avelo has no
6 objection Plaintiffs displaying the New Billboards because they do not use Avelo's trademarks as a
7 designator of source, only descriptively to refer to Avelo. On the other hand, absent an injunction,
8 Avelo will still have to contend with confused customers and customer complaints that have had
9 and will continue to have an unquantifiable effect on Avelo's business, reputation, and goodwill.
10 Accordingly, this factor strongly favors the entry of a temporary restraining order and preliminary
11 injunction.

12 **D. The Public Interest Favors Injunctive Relief.**

13 The public has an interest in not being deceived or confused. *Wetzel's Pretzels, LLC v.*
14 *Johnson*, 797 F. Supp. 2d 1020, 1028 (C.D. Cal. 2011). In this case, the public's interest in not
15 being deceived by Plaintiffs and/or confused as to the source of the AVELNO! campaign or as to
16 whether a connection exists between Avelo and Plaintiffs weighs strongly in favor of injunctive
17 relief.

18 **E. Alternatively, an Injunction is Warranted Under the Sliding Scale.**

19 “[S]erious questions going to the merits and a balance of hardships that tips sharply toward
20 the [moving party] can support issuance of a preliminary injunction, so long as the [moving party]
21 also shows that there is a likelihood of irreparable injury and that the injunction is in the public
22 interest.” *Alliance for the Wild Rockies*, 632 F.3d at 1131-32 (internal quotations omitted). A
23 “serious question” is one on which the moving party has a “fair chance” of success. *Stanley v.*
24 *Univ. of S. Cal.*, 13 F.3d 1313, 1319 (9th Cir. 1994). Here, Avelo has shown that Plaintiffs’
25 “avelNO! campaign” has, from day one, set out not just to express criticism of Avelo, but also to
26 damage Avelo’s goodwill in its Avelo Marks by using Avelo’s own intellectual property to lure
27 consumers to its message and solicit them for money, confusing them in the process. Avelo has
28 also shown that it is suffering irreparable harm to its goodwill, that Plaintiffs will suffer little, if

any hardship if enjoined, and the public interest favors an injunction to prevent consumer confusion.

F. Only a Minimal Bond Should be Required.

The Court has wide discretion in setting the bond amount and may dispense with the requirement altogether when there is no realistic likelihood of harm to the defendant or where the moving party establishes a strong likelihood of success on the merits. *Johnson v. Couturier*, 572 F.3d 1067, 1085 (9th Cir. 2009); *Van de Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1326 (9th Cir. 1985). No bond should be required here because Avelo has shown a strong likelihood of success on the merits and there is little to no chance that Plaintiffs will suffer damages from being wrongfully enjoined.

CONCLUSION

12 For all of the foregoing reasons, Avelo respectfully requests that the Court enter an order
13 granting the relief requested above.

Dated: this 24th day of June 2025

Respectfully submitted,

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